STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 11, 2006
v	No. 258726 Kent Circuit Court
WILLIAM LEE COONROD, Defendant-Appellant.	LC No. 04-000959-FC

Before: Meter, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant also challenges his sentence of 14 to 50 years' imprisonment. We affirm.

Defendant and his wife, Sue, were neighbors of the eight-year-old victim and her mother. The victim's mother often babysat for defendant's son, and there was some indication that the victim's mother and defendant were having an affair. The evidence indicated that at some point, defendant began inappropriately touching and kissing the victim. The victim's mother suspected that defendant was acting inappropriately towards the victim and occasionally tried to confront defendant about her suspicions. However, many of the allegations went unreported.

Defendant's convictions arose from two instances in which he allegedly touched the victim's vaginal area. The first charged offense occurred when the victim and her neighborhood friend were playing in defendant's sprinkler. After they finished playing, defendant rubbed the victim's vaginal area over her swimsuit bottom. The second charged offense occurred when defendant spent the night at the victim's mother's home. When the victim was sleeping, defendant lay down next to her and rubbed her vaginal area. The victim awoke, ran to her mother, and reported the incident. The victim's mother confronted defendant, and this resulted in a heated exchange of words. She reported this incident to the police, and an investigation by Cedar Springs Police Department Officer Amy Brondyke ensued.

Defendant argues that the trial court abused its discretion in admitting Brondyke's testimony that the victim's cousin's statement indicated that she (the cousin) was a second victim and had been touched. Defendant argues that the testimony was irrelevant and prejudicial and was admitted in violation of his due process rights and his Sixth Amendment right to confrontation. Although defendant objected to the admission of Brondyke's testimony on

hearsay grounds, this objection did not preserve his current appellate arguments. MRE 103(a)(1); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). We review unpreserved evidentiary issues for plain error affecting defendant's substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant first argues that Brondyke's testimony regarding the contents of the cousin's statement was not relevant to any material issue in the trial and therefore was inadmissible under MRE 401. We disagree. Evidence must be material to be admitted under MRE 401; in other words, "the matter sought to be established by the evidence must be 'in issue,'" or otherwise of consequence to the determination of the action. *People v Mills*, 450 Mich 61, 67, 67 n 4; 537 NW2d 909 (1995), mod on other grnds 450 Mich 1212 (1995). The evidence must have probative value with respect to a pertinent issue; that is, it must "make a fact of consequence more or less probable than it would be without the evidence." *Id.* at 67.

On cross-examination, Brondyke revealed that during an interview, the victim claimed that defendant touched her cousin. Brondyke also testified on cross-examination that she attempted to contact the victim's cousin to investigate this allegation, but the victim's cousin's mother would not allow an interview. Instead, the cousin prepared a brief statement regarding the allegations that defendant had touched her; this was the only information Brondyke received from the cousin regarding the alleged touching. Brondyke listed the cousin as a victim in her report, but she testified on cross-examination that she did not believe the cousin was a victim.

We conclude that Brondyke's testimony that the cousin was a possible second victim and that she had been touched was relevant under MRE 401. The defense sought to discredit Brondyke's testimony by attacking the reliability of her report. Brondyke's description of the contents of the cousin's statement permitted the jury to determine if Brondyke had a valid reason for listing the cousin as a second victim in her report and, by extension, whether her report was reliable. Brondyke's testimony rehabilitated her report, because it indicated that Brondyke had a valid reason for noting in her report that the cousin was a second victim.

Defendant next argues that Brondyke's testimony should not have been admitted as evidence under MRE 403 due to its highly prejudicial nature. Defendant also contends that the admission of Brondyke's testimony violated his due process rights to a fair trial. However, defendant does not develop an argument with regard to the MRE 403 or the due process issues. "'Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.'" *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001), quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). We therefore decline to address the issues in question. *Norman*, *supra* at 261.

Defendant also argues that the trial court violated his Sixth Amendment right to confrontation by admitting Brondyke's testimony describing the cousin's statement. We do not agree. The United States Supreme Court has held that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Defendant maintains that *Crawford* applies to the present case because the statement the cousin provided to Brondyke was a testimonial statement. However, this Court has noted that "the [*Crawford*] Court also made clear that the Confrontation 'Clause . . . does not bar the use of testimonial statements for purposes other than establishing the

truth of the matter asserted.'" *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004), quoting *Crawford, supra* at 59 n 9.

The prosecution elicited Brondyke's testimony for a non-hearsay purpose. When the trial court denied defense counsel's objection to the introduction of Brondyke's testimony, it cautioned the jury that Brondyke's testimony regarding the contents of the cousin's statement was not being received "to establish whether there was or was not some touching of the second person." Instead, on cross-examination, defense counsel had questioned Brondyke regarding why she had listed the cousin as a victim in her police report, eliciting from Brondyke that the cousin was not a victim and her report was in error. Because defendant had initially questioned the credibility of Brondyke's report with regard to her decision to list the cousin as a victim, the trial court concluded that the prosecution's questions regarding what Brondyke learned from the cousin's statement were relevant to help the jury understand "her investigation and how she put together her report." By asking Brondyke about what the cousin's statement indicated to her, the prosecution could rebut defendant's evidence that Brondyke's report was unreliable by showing that she had a reason for listing the cousin as a victim. Because Brondyke's testimony was admitted for a non-hearsay purpose, we conclude that the trial court did not violate defendant's right to confrontation by admitting this testimony.

Defendant further argues that the trial court violated his right to confrontation by finding that defense counsel "opened the door" to Brondyke's testimony and consequently waived defendant's right to confrontation. We again find no violation of the right to confrontation. Indeed, as noted above, Brondyke's testimony was admitted for a non-hearsay purpose, and the trial court therefore did not violate defendant's right to confrontation by admitting the testimony. Defendant also claims that the admission of Brondyke's testimony was not harmless. However, where there is no error, this Court is not required to determine if it was harmless. *Ferguson v Gonyaw*, 64 Mich App 685, 691; 236 NW2d 543 (1975).

We also conclude that the trial court did not err in finding that defendant's trial counsel, Damian Nunzio, had not been ineffective. Whether a defendant has been deprived of effective assistance of counsel is a mixed question of fact and law; this Court must first determine the facts and then decide whether the facts constitute a violation of defendant's right to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Factual findings are reviewed for clear error, although constitutional determinations are reviewed de novo. *Id.* Effective assistance of counsel is presumed, and a "defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In reviewing a claim of ineffective assistance of counsel, "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

"To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). To demonstrate that counsel's performance was deficient, defendant must establish that his counsel's representation "fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Id.* To establish that his counsel's

deficient performance prejudiced the defense, defendant must establish that his counsel's representation "was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). This means defendant "must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). Finally, defendant must show that due to his counsel's deficient performance, the resulting proceedings "were fundamentally unfair or unreliable." *Rodgers, supra* at 714.

"'[D]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy . . . .'" *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), quoting *Rockey, supra* at 76. "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *Dixon, supra* at 398. "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990).

Defendant first argues that Nunzio was ineffective because he did not permit Sue Coonrod, defendant's wife, and Frances Coonrod, defendant's mother, to testify. We disagree. Nunzio concluded that neither Sue nor Frances would be an appropriate witness because he was concerned that they would be trapped into providing testimony regarding defendant's prior convictions for sexual misconduct. Nunzio provided a valid strategic reason for choosing not to have Sue and Frances testify. Because this Court does not substitute its judgment for counsel's regarding matters of trial strategy, we conclude that the trial court did not err in finding that defendant failed to establish that Nunzio was ineffective in failing to have Sue and Frances testify.

Defendant also argues that Nunzio was ineffective because he failed to read statements Sue had prepared and ignored Sue's claims that she was an eyewitness and did not see defendant act inappropriately. We disagree. Because Nunzio testified that he did fully read the documents provided to him before trial, this question is one of credibility, and the trial court concluded that Nunzio properly read the documents provided. Pursuant to MCR 2.613(C), we defer to the trial court's findings that Nunzio properly read the documents provided to him, and we conclude that the trial court did not err in finding defendant did not establish Nunzio was ineffective due to any failure to prepare properly for trial.

Defendant also claims that Nunzio was ineffective when he failed to present as evidence a Super 8 Motel receipt purportedly indicating that defendant could not have touched the victim because he stayed in this hotel on November 5, 2003, the day the victim claims he touched her. We do not agree. Nunzio concluded that the Super 8 Motel receipt did not provide an effective alibi for defendant and would give the prosecution the opportunity to again remind the jury, in the course of expert testimony concerning how young children often get dates confused, of the victim's allegations. Because Nunzio decided not to introduce the receipt for tactical reasons, and because this Court does not substitute its judgment for that of counsel regarding matters of trial strategy, we find that the trial court did not err in concluding that defendant failed to establish that Nunzio was ineffective when he decided not to enter the receipt into evidence. *Rockey, supra* at 76-77.

Defendant also claims Nunzio should have presented as evidence a tape of the victim's mother screaming at the victim to tell Sue that defendant touched her. However, defendant never

explains how Nunzio's failure to present this tape as evidence constituted deficient performance denying defendant a fair trial.

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." [*People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

Therefore, we will not address this claim further.

Next, defendant claims that Nunzio was ineffective because he failed to adequately cross-examine the victim's mother regarding her various threats to defendant to report him for sexually abusing her daughter and her desire to use defendant's prior sex convictions to blackmail defendant. We disagree. Nunzio claimed that he believed cross-examining the victim's mother regarding her prior threats to call the police would have highlighted that these previous threats were made in reference to uncharged allegations that defendant touched the victim, which he did not want to highlight. Decisions regarding the questioning of witnesses are presumed to be matters of trial strategy. *Dixon*, *supra* at 398. Because Nunzio made a tactical decision not to cross-examine the victim's mother regarding her previous threats to report defendant to the police, and because we do not substitute our judgment for that of counsel regarding matters of trial strategy, we find that the trial court did not err in concluding that defendant failed to establish that Nunzio's decision constituted ineffective assistance of counsel.

Defendant also claims that Nunzio's failure to object to Brondyke's testimony regarding the contents of the victim's cousin's statement on grounds that this testimony violated defendant's right to confrontation constituted ineffective assistance of counsel. We disagree. Defendant's right to confrontation was not violated by the introduction of Brondyke's testimony for a non-hearsay purpose. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *Riley*, *supra* at 142. Therefore, Nunzio was not ineffective for failing to object to Brondyke's testimony on constitutional grounds.

Defendant also claims that Nunzio's decision to elicit testimony from Brondyke regarding the victim's cousin constituted ineffective assistance of counsel. Although Nunzio admitted that he originally brought up Brondyke's investigation into the cousin's allegations, he also testified that by eliciting testimony from Brondyke that she listed the victim's cousin as a primary victim in her report yet did not believe the cousin was a victim, he called the credibility of Brondyke's report into question and suggested that the police "botched" the investigation. Because Nunzio elicited this testimony for tactical reasons, and because this Court does not substitute its judgment for that of counsel regarding matters of trial strategy, we conclude that defendant failed to establish that Nunzio was ineffective for eliciting testimony from Brondyke regarding her investigation into allegations that the victim's cousin was a second victim. *Rockey*, *supra* at 76-77.

Finally, Coonrod submits that the trial court violated his Sixth Amendment right to be sentenced only according to factors with regard to which he had been found guilty by a jury, as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531, 2537; 159 L Ed 2d 403 (2004).

However, this argument is without merit under *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), and *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004).

Affirmed.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Jane E. Markey